

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

CHARLES K. PETTRY,
Claimant Below, Petitioner

vs.) No. 19-0663 (BOR Appeal No. 2054001)
(Claim No. 2012035974)

PANTHER BRANCH COAL COMPANY,
Employer Below, Respondent

FILED

November 6, 2020
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Charles K. Pettry, by Counsel Reginald D. Henry, appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Panther Branch Coal Company, by Counsel H. Toney Stroud, filed a timely response.

The issue on appeal is permanent partial disability. The claims administrator granted no additional permanent partial disability on November 17, 2017. The Workers' Compensation Office of Judges ("Office of Judges") affirmed the decision in its February 26, 2019, Order. The Order was affirmed by the Board of Review on June 27, 2019.

The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

On April 26, 2012, Mr. Pettry filed an application for occupational pneumoconiosis indicating he was a coal miner and was exposed to coal dust for thirty-five years. A Physician's Report of Occupational Pneumoconiosis was completed that day and indicated Mr. Pettry was a nonsmoker who had cough, wheezing, and shortness of breath. He was exposed to coal dust for thirty-five years and was diagnosed with coal workers' pneumoconiosis. The claim was held compensable on a nonmedical basis for occupational pneumoconiosis on June 20, 2012.

In December 11, 2012, findings, the Occupational Pneumoconiosis Board ("OP Board") found that Mr. Pettry had work exposure significant enough to cause occupational

pneumoconiosis. He was examined in April of 2003, and the OP Board found 10% impairment. X-rays were taken and compared to 2003 x-rays. They were essentially unchanged. The OP Board concluded that Mr. Pettry had no impairment beyond the 10% found in 2003. A pulmonary function study was completed that same day and showed prebronchodilator FVC of 77%, FEV1 of 69%, and FEV1/FVC of 69%. Postbronchodilator showed a 2% increase in FVC, 6% increase in FEV1, and 2% increase in FEV1/FVC. Diffusion studies showed a DLCO of 89%. On February 1, 2016, a pulmonary function study showed prebronchodilator FVC of 75%, FEV1 of 70%, and FEV1/FVC of 70%. Postbronchodilator showed a 1% increase in FVC, 1% increase in FEV1, and no change in FEV1/FVC. Diffusion studies showed a DLCO of 71%.

Members of the OP Board testified in a November 16, 2016, hearing. Jack Kinder, M.D., from the OP Board, stated that he reviewed the pulmonary function studies and found a decrease in diffusion. Dr. Kinder opined that patients with positive x-rays and a decrease in diffusion usually require reevaluation. Dr. Kinder stated that the 2016 pulmonary function study showed no additional permanent partial disability when compared to the 2012 study.

On September 14, 2017, the OP Board found that new x-rays showed nodular fibrosis with no interval change since the prior x-rays. A pulmonary function study was performed and showed prebronchodilator FVC of 74%, FEV1 of 68%, and FEV1/FVC of 68%. Postbronchodilator showed a 7% increase in FVC, 10% increase in FEV1, and a 2% increase in FEV1/FVC. Diffusion studies showed a DLCO of 76%. The claims administrator granted no additional permanent partial disability award on November 17, 2017.

In a January 9, 2019, final hearing, members of the OP Board testified that the latest x-rays showed minimal nodular fibrosis and parenchymal opacities consistent with simple occupational pneumoconiosis. New x-rays showed no progression of the disease. Dr. Kinder testified that there was no basis to support an additional permanent partial disability award.

The Office of Judges affirmed the claims administrator's decision granting no additional permanent partial disability award in its February 26, 2019, Order. It found that Mr. Pettry was previously granted a 10% permanent partial disability award for occupational pneumoconiosis based on the OP Board's recommendation. The OP Board evaluated Mr. Pettry in 2017 and found no additional impairment. Members of the OP Board testified in a January 2019 hearing that the medical evidence of record does not support an additional permanent partial disability award. The Office of Judges concluded that Mr. Pettry failed to present any evidence showing the OP Board's findings are clearly wrong. Therefore, the claims administrator's decision was affirmed. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on June 27, 2019.

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. Mr. Pettry failed to show that he is entitled to more than the 10% permanent partial disability award already granted.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous

conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

ISSUED: November 6, 2020

CONCURRED IN BY:

Chief Justice Tim Armstead
Justice Margaret L. Workman
Justice Elizabeth D. Walker
Justice Evan H. Jenkins
Justice John A. Hutchison